TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 736

WONG DOO, PETITIONER,

vs.

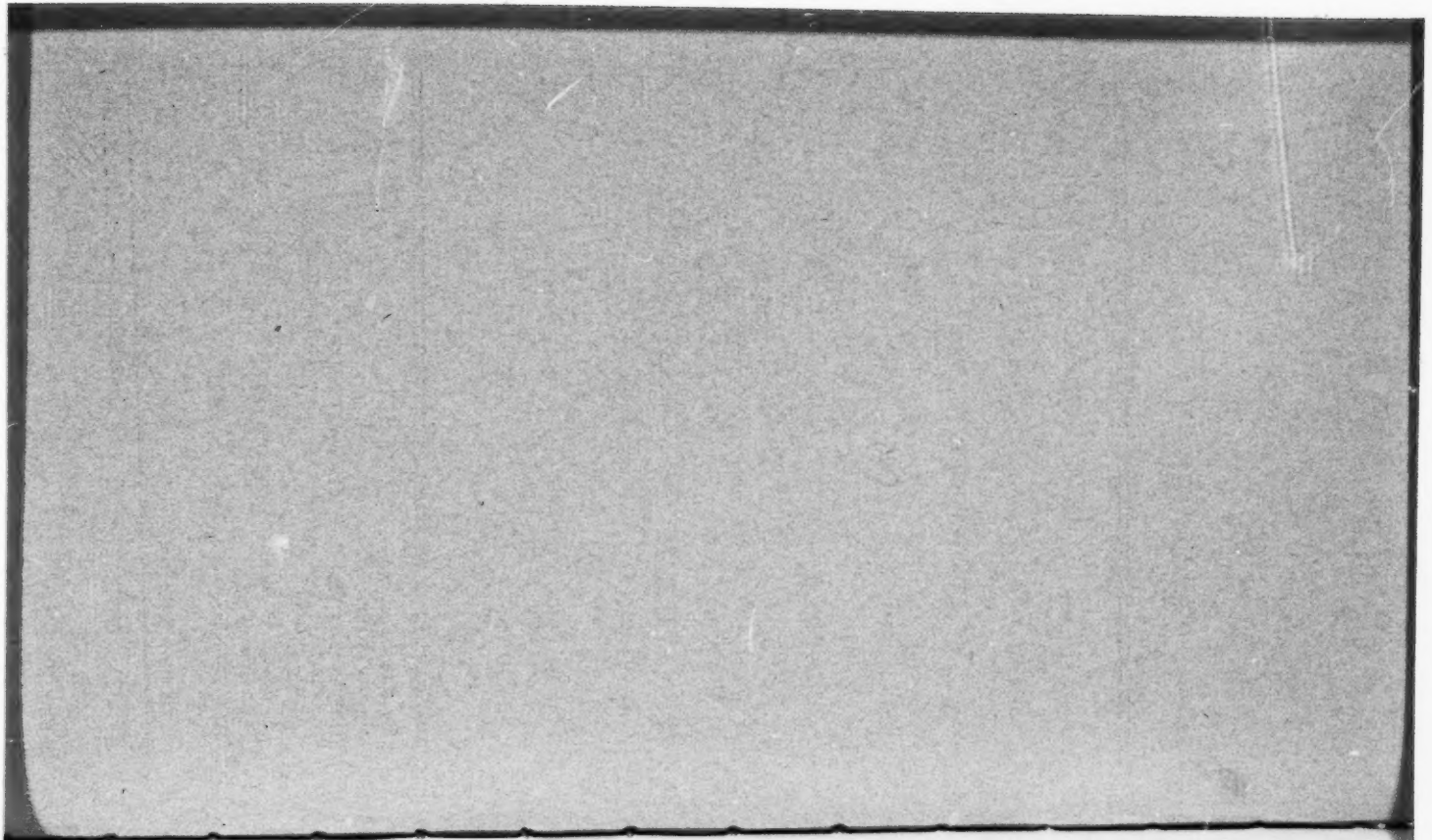
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 9, 1924

ORDER GRANTING CERTIORARI FILED FEBRUARY 18, 1924

(30,046)



(30,046)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 736

WONG DOO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1924

[fol. 1] Caption omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRIT OF HABEAS CORPUS AND WRIT OF CERTIORARI—Filed Aug. 8, 1922

To the Honorable the District Court of the United States in and for the Northern District of Ohio:

First. Petitioner herein, Wong Doo, says that he is the son of Wong Sun, and that he came to the United States on or about January 25, 1915, receiving admission at San Francisco as the minor son of Wong Sun, a Chinese merchant; that since April, 1915, after residing in San Francisco, California, and pursuing his studies as a student, he has been a resident of the City of Cleveland, County of Cuyahoga and State of Ohio, in the District and Division aforesaid, and within the jurisdiction of this Court and at all times since his residence in Cleveland he has followed his studies as a student and is lawfully entitled to remain in the United States at the present time.

Second. Said petitioner is now actually imprisoned and restrained of his liberty and detained, by color of the authority of the United States in the custody of J. A. Fluckey, Esquire, Inspector in Charge of the Immigration Service of the Department of Labor of the United States of America at Cleveland, Ohio, in the district and division aforesaid, and within the jurisdiction of this Court.

Third. The sole claim and sole authority by virtue of which the said J. A. Fluckey, Immigration Inspector as aforesaid, so restrains and detains said petitioner is a certain paper which purports to be a warrant, in writing, which in substance orders the arrest of this petitioner under the alleged authority of Section 19 of the Immigration Act of February 5, 1917, for the alleged violation of the Chinese-Exclusion Laws, in that: "That he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes." Said order being signed by the Secretary of Labor. And, the petitioner being further held in custody by the said J. A. Fluckey, under color of an order of deportation, the exact nature of which this petitioner is unable to more particularly describe than it is based upon said warrant herein referred to and the proceedings hereinafter set forth.

[fol. 3] Fourth. Petitioner says that his father, Wong Sun, at the time of his admission to the United States as a son of a domiciled merchant was a bona fide member of the merchant firm of Chong Lee and Company in San Francisco and had complied with the Chinese-exclusion laws and all other laws of the United States in every respect at the time of his admission as a merchant, and

was such at the time this petitioner was admitted into the United States; that petitioner's father, Wong Sun, resided with petitioner in San Francisco from January 25, 1915, until April, 1915, pursuing his calling of a merchant with Chong Lee & Company, and that in April, 1915, Wong Sun with the petitioner came to Cleveland at the instance of Chong Lee & Company to obtain a new business location and branch store for this firm and with the understanding that petitioner was to follow his studies as a student.

Fifth. Said petitioner herein says that on August 3, 1915, he together with his father, Wong Sun, and Wong Fee, were temporarily residing at a Chinese laundry in Cleveland, Ohio, and were apprehended for examination and taken into custody by officers of the Immigration Department without any warrant or authority in law; that a witness, to-wit: one Mack, was asked questions and gave answers without being sworn, which questions and answers constituted part of the basis for the order of deportation and warrant herein; that sundry witnesses were examined in English without this petitioner's being able to understand the questions and answers; that petitioner's possessions were searched and appropriated, particularly his papers without warrant or authority of law and against his will.

Petitioner says that an application for a writ of habeas corpus based solely upon jurisdictional grounds was applied for and upon hearing denied by this Honorable Court and the United States Circuit Court of Appeals but petitioner says that at said hearing none of the questions herein raised were considered or before either of said courts.

Petitioner says that at the preliminary hearings he was not represented by counsel and had no opportunity for obtaining representation: that at the preliminary hearings the interpretation of the Chinese testimony by the said interpreter was imperfect; that after the warrant of arrest was issued for petitioner witnesses were examined in the absence of his counsel and petitioner's absence without [fol. 4] his opportunity of cross examining them and that said testimony so taken, together with the unsworn statements of two doctors and one white witness were made a part of said record and said proceedings.

Sixth. Said petitioner further says that the hearing of his case and his father, Wong Sun, and his brother, Wong Fee, and that of another Chinese Chan Yim, were combined to the prejudice of this petitioner and the procedure had in all four cases was made a part of the record of said proceedings against this petitioner.

Seventh. Petitioner further says that the Department of Labor drew an erroneous conclusion of fact and erroneous conclusions of law from such facts as were presented in this: That it charged the father of this petitioner, Wong Sun, with having obtained admission into the United States by fraud, and that the aforesaid Wong Sun was not a domiciled merchant and returning as such, whereas, in truth and fact Wong Sun at said time and at the time

of petitioner's admission was a properly domiciled merchant as is borne out by the hearings of the department itself in respect thereto and not contradicted by any evidence produced at any of the hearings reasonably considered; that the evidence all being to the effect that Wong Sun re-entered the United States in 1914 rightfully as a domiciled merchant returning in accordance with the provisions of the rules and regulations of the Immigration Department. The fact that this petitioner having been admitted as the son of such domiciled merchant should afterwards be found with his father in a laundry, almost a year having elapsed since his entry, would as a matter of law not affect the legality of this petitioner's entry into the United States, or his continuing here thereafter and for the reason that the Department of Labor determined the law to be otherwise it erred in this respect:

Eighth. Said petitioner further says that in the proceedings before the Department of Labor certain documents and exhibits and other papers were offered and admitted in evidence against the petitioner herein, over his objections, and each of which, under the statutes of the State of Ohio, and of the United States and of the constitution of the United States were improperly taken from the place where petitioner was apprehended were so admitted to the prejudice of the petitioner.

[fol. 5] Ninth. Said petitioner herein further says that there is no competent or proper evidence before said Department of Labor to show that said petitioner was subject to removal or deportation or guilty of any of the charges or violations set forth in said warrant, or to show that said Department of Labor of the United States had any jurisdiction over the petitioner whatsoever.

Tenth. Petitioner further says that he is entitled to be and remain in the United States and is not subject to deportation either under the Immigration Act of February 5, 1917, or the Chinese-exclusion Acts and that he is now in the custody of said J. A. Fluckey without any legal authority whatsoever to be deported to China at the earliest possible moment.

Eleventh. Petitioner further alleges that he does not have and is unable to procure a full and complete copy of the record of the proceedings had before the Department of Labor in his case, together with the exhibits which were made a part thereof but that he is filing with the Court so much of the record as is in his possession under separate cover and marked "Exhibit A" said record being of the cases of Wong Sun, Wong Fee, Chan Yim and himself; that the record filed herewith and marked for identification "Record in the cases of Wong Sun, Wong Doo, Wong Fee and Chan Yim" be made a part hereof by reference.

Wherefore, said petitioner herein prays that a writ of habeas corpus may issue, directed to the said J. A. Fluckey, Inspector in Charge at Cleveland, Ohio, of the Immigration Service of the De-

partment of Labor of the United States and to each and all of his deputies requiring him and them to bring and have said petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of said petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue, directed to the said J. A. Fluckey as Immigration Inspector in Charge, to certify to this Court all the proceedings that took place and all of the evidence, reports, recommendations, correspondence and documents of whatsoever nature, which were in possession of or used or examined by or offered before the Department of Labor in the proceedings which resulted in the order of deportation in the case of the said pe-
[fol. 6] titioner herein and that all of the same be filed herein and made a part of this petition; and that this Court may issue a writ of habeas corpus to the said J. A. Fluckey; that your petitioner be discharged from said illegal restraint and for all other relief to which by reason of the premises he may be entitled.

Wm. J. Dawley, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by Wong Doo omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRIT OF HABEAS CORPUS—Entered August 8, 1922, by D. C. Westenhaver, Judge

This cause came on to be heard on the application of Wong Doo for a writ of habeas corpus and the Court being advised in the premises, it is ordered that an alternative writ issue as prayed for in the application, returnable Friday, August 11th, 1922.

[fol. 7] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS WITH RETURN—Filed Aug. 11, 1922

[Title omitted]

To J. A. Fluckey, Esquire, Inspector in Charge, of the Immigration Service of the Department of Labor of the United States of America, Cleveland, Ohio:

We command you that the body of Wong Doo, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before me, D. C. Westenhaver, Judge of our District Court of the United States, within and for the Division and District aforesaid on Friday, August 11, 1922, at 9:30 A. M. to do and receive all and singular those things which the said D. C.

Westenhaver, Judge of our said District Court, shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable D. C. Westenhaver, Judge, U. S. District Judge, Northern District of Ohio, this 8th day of August, A. D. 1922.
Attest:
B. C. Miller, Clerk, by C. A. Wilder, Deputy. (Seal.)

U. S. Marshal's Return

Received this writ at Cleveland, Ohio, Aug. 8, 1922, and on Aug. 10, 1922 at the same place, I served it on the within named J. A. Fluckey by delivering to him personally, a true and certified copy hereof, with all endorsements thereon.
Geo. A. Stauffer, U. S. Marshal. A. L. Gibson, Deputy.

Marshal's Fees

Travel	6
Service	2 00
	2 06

[fol. 8] IN UNITED STATES DISTRICT COURT

RETURN OF J. A. FLUCKEY—Filed Aug. 29, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Your respondent, J. Arthur Fluckey, respectfully represents to the Court that he is and was at the time mentioned in the application for a Writ of Habeas Corpus the Inspector in Charge, at Cleveland, Ohio, of the Immigration Service of the Department of Labor of the United States, and that as such officer, in his official capacity, he is holding the petitioner, Wong Doo, in the above entitled case, under and by virtue of a certain warrant for the arrest of said petitioner, duly issued to respondent, J. Arthur Fluckey, Inspector in Charge, Cleveland, Ohio, or to any Immigrant Inspector in the service of the United States, a copy of said warrant, issued by John W. Abercrombie, Acting Secretary of Labor on the 27th day of March, 1918, being attached hereto and marked "Exhibit A"

Your respondent further says that pursuant to said warrant of arrest, the petitioner herein was taken into custody and granted a full and fair hearing in compliance with the immigration act of February 5, 1917, and the rules and regulations thereunder, that the said petitioner was represented throughout the hearing by counsel, that petitioner and counsel were afforded an opportunity to inspect the warrant of arrest and all the evidence theretofore and thereafter taken in the matter, and an opportunity to submit a brief of which

latter opportunity they did not avail themselves, and that after the submission of the complete record and exhibits by respondent to the Secretary of Labor, and a full consideration thereof by the appropriate officials of the Department of Labor, a warrant of deportation was duly issued by Louis F. Post, Assistant Secretary of Labor on the 15th day of June, 1920, a copy of which is attached hereto, and marked "Exhibit B."

Your respondent further says that on or about August 3, 1915, the petitioner, Wong Doo, was found residing in a laundry at No. 12100 St. Clair Avenue, Cleveland, Ohio, by regularly appointed officials of the Immigration Service of the Department of Labor engaged in the discharge of their lawful duties, that said petitioner was taken into custody and questioned and that a record of all questions was made and transmitted to the Secretary of Labor; that certain letters [fol. 9] and papers written in the Chinese language were found in the laundry aforesaid, which, together with other evidence established the fact that Wong Doo, the petitioner herein, was a laborer, notwithstanding his claim that he was and had been the minor son of a merchant within the meaning of Rule 9, Chinese rules, and of the decision of the Supreme Court on which said rule is based, and notwithstanding he entered the United States at the port of San Francisco, California, on the 25th day of January, 1915, ostensibly as the minor son of a Chinese merchant, to-wit, as alleged son of Wong Sun, Petitioner No. 11569 in these proceedings, and was granted a certificate of identity (No. 18563). Whereupon the petitioner was arrested pursuant to a warrant issued on August 9, 1915, by J. B. Densmore, Acting Secretary of Labor, under the act of February 20, 1907, which charged that said petitioner had been found within the United States in violation of Rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based having secured admission on the claim of being the minor son of a member of the exempt classes, but having become a laborer since admission. Under that warrant the petitioner was granted a full and fair hearing on the matters and things involved in the said warrant of arrest, the petitioner being present during the hearing and represented by counsel who with petitioner had full opportunity to inspect and make a copy of the minutes of the hearing and to offer evidence to meet any evidence previously or subsequently presented by the Government, and had full opportunity to show cause why he should not be deported. Your respondent says that the hearing was held in good faith, that there was no abuse of discretion lodged by law in the Secretary of Labor, that the said hearing was had in accordance with the law and regulations of the Department then applying, and that after due consideration of the record of said hearing, the exhibits appended thereto, and the brief of counsel, the honorable W. B. Wilson, Secretary of Labor, on April 5, 1916, issued his warrant for the deportation of said petitioner to China.

Whereupon your respondent took the said petitioner into custody and in due course a Writ of Habeas Corpus (No. 9308) was granted by this Honorable Court discharging the petitioner from custody

solely because of the decision of the Supreme Court of the United States in a similar case that the Secretary of Labor did not have au-
[fol. 10] thority under the Act of February 20, 1907, to deport Chinese aliens from the United States in the manner provided in said act for violation of the Chinese exclusion acts of the United States.

Thereafter, on or about the second day of April, 1918, your respondent took the said petitioner into custody under the warrant of arrest hereinbefore described as "Exhibit A," based upon identically the same evidence and containing substantially the same charges as in the previous proceedings except that the warrant was issued on the 27th day of March, 1918, pursuant to the immigration act of February 5, 1917, which act was passed by Congress as a substitute for the Act of February 20, 1907. Under this warrant the petitioner was granted a due hearing as hereinbefore set forth, and pursuant to a warrant of deportation, as per "Exhibit B" attached, was taken into custody for deportation to China; whereupon the said petitioner applied to this Honorable Court for a Writ of Habeas Corpus (No. 10487) representing that the Secretary of Labor was not clothed with authority to deport the said petitioner from the United States in the manner provided by the said immigration act of February 5, 1917, for violation of the Chinese-exclusion Acts of the United States, and upon hearing before this Honorable Court and being remanded to your respondent for execution of the order of the Secretary of Labor, appealed to the Circuit Court of Appeals, Sixth Circuit, which appeal was dismissed in due course by said Honorable Court (No. 3577).

And finally your respondent says that at all times the petitioner herein has been dealt with in a just and honorable manner by the Secretary of Labor, by your respondent and his subordinates, having been granted numerous continuances and considerations.

Your respondent denies each and every allegation of the petition except those which have been specifically admitted, and alleges that the said petitioner is now held in lawful custody by your respondent, J. Arthur Fluckey, under and by virtue of the said warrants of arrest and deportation and instructions as aforesaid.

Wherefore, your respondent prays that he may be allowed to go hence with the body of the petitioner, Wong Doo.

J. Arthur Fluckey, Inspector in Charge.

[fol. 11] Jurat showing the foregoing was duly sworn to by J. A. Fluckey omitted in printing.

EXHIBIT "A" TO RETURN

United States of America

Department of Labor

Washington

Bureau of Immigration

Form 8 C

Warrant—Arrest of Alien

No. 53943/21

To J. A. Fluckey, inspector in charge, Cleveland, Ohio, or to any immigrant inspector in the service of the United States:

Whereas, from evidence submitted to me, it appears that the alien Wong Doo, who landed at the port of San Francisco, Cal., ex SS. "Siberia," on the 25th day of January, 1915, is subject to be taken into custody and returned to the country where he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of the law of the United States, to-wit, the Chinese-exclusion law, for the following among other reasons:

That he has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

I, John W. Abercrombie, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

[fol. 12] The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation: "Expenses of Regulating Immigration, 1918." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $2,000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 27th day of March, 1918.

(Signed) John W. Abercrombie, Acting Secretary of Labor.

(Seal.) JJK.

EXHIBIT "B" TO RETURN

United States of America

Department of Labor

Washington

Bureau of Immigration

Form 8 D

Warrant—Deportation of Alien

No. 53943/21. Incl. No. 3989

To Edward White, Commissioner of Immigration, Angel Island Station, San Francisco, California:

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector Joseph Francis, held at Cleveland, Ohio, I have become satisfied that the alien Wong Doo, who landed at the port of San Francisco, California, ex SS. "Siberia," on the 25th day of January, 1915, is subject to be returned to the country whence he came under section 19 of the immigration act of February 5, 1917, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese-exclusion law, in that:

He has been found within the United States in violation of rule 9, Chinese rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to the country whence he came, at the expense of the steamship company importing him.

[fol. 13] For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of June, 1920

(Signed) Louis F. Post, Assistant Secretary of Labor. (Seal.)

IN UNITED STATES DISTRICT COURT

HEARING ON PETITION—Entered Sept. 8, 1922, by D. C. Westenhaver, Judge

This day this cause came on to be heard on the application for a writ of habeas corpus, and was argued by counsel, submitted to the Court and taken under advisement by the Court.

In United States District Court

Hearing on Application for Leave to File Amended Return—Entered Sept. 15, 1922, by D. C. Westenhaver, Judge.

This cause having been submitted to the Court on a previous day of this term upon an application for a writ of habeas corpus and before decision thereof, the United States Attorney requested leave of the Court to file an amended return herein, the petitioner objected [fol. 14] to the granting of said leave and the Court, being advised in the premises, overruled the objection of the petitioner and granted leave to the United States Attorney to file his amended return herein instanter; to the granting of which leave the petitioner, by his attorney, excepts.

In United States District Court

Amended Return—Filed Sept. 15, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Now comes J. Arthur Fluckey, Inspector in Charge of the Immigration Service of the Department of Labor of the United States at Cleveland, Ohio, respondent in the above entitled cause and leave of court having been first obtained, files this his amended return herein.

Your respondent says that he is holding the petitioner Wong Doo under and by virtue of a certain warrant for the arrest of said Wong Doo duly issued to respondent, or to any immigrant inspector in the service of the United States, by John W. Abercrombie, Acting Secretary of Labor, on the 27th day of March, 1918, a copy of which warrant of arrest is hereto attached and marked Exhibit "A."

The respondent further says that pursuant to the said warrant of arrest the petitioner was taken into custody and granted a full and fair hearing in compliance with the Immigration Act of February 5, 1917 and the rules and regulations promulgated thereunder; that petitioner was represented by counsel throughout the hearings held subsequent to the issuance of said warrant of arrest; that petitioner and his counsel were afforded an opportunity to inspect said warrant of arrest and all evidence theretofore and thereafter taken in the [fol. 15] matter and that after the submission of the complete record and the exhibits by the respondent to the Secretary of Labor and a full consideration thereof by the appropriate officials of the Department of Labor, a warrant ordering the deportation of the petitioner herein was duly issued by Louis F. Post, Assistant Secretary of Labor, on the 15th day of June, 1920, a copy of which warrant of deportation is hereto attached and marked Exhibit "B." Your respondent denies each and every other allegation in the petition contained not herein specifically admitted to be true.

Further answering, your respondent respectfully represents to the Court that on the 29th day of June, A. D., 1920, Wong Doo, the petitioner herein, filed his application for a writ of habeas corpus in the District Court of the United States for the Northern District of Ohio, Eastern Division, Docket Number of said case being 10487 Law; that said application set forth the issuance of the warrant for the arrest of said Wong Doo by John W. Abercrombie, Acting Secretary of Labor, on the 27th day of March, 1918, and also issuance of the warrant for the deportation of said Wong Doo by Louis F. Post, Assistant Secretary of Labor, on the 15th day of June, 1920; said application so filed in behalf of said Wong Doo on June 29, 1920 also contained the allegation that the hearings conducted before your respondent were manifestly unfair and not impartial to said Wong Doo, but that the petitioner was examined on several occasions by your respondent and his assistants without the privilege of counsel and found by respondent to be unlawfully in the United States, solely from the testimony of witnesses, cross examination of whom was not had by petitioner's counsel.

Your respondent says that on July 1st, 1920, an alternative writ of habeas corpus was issued to your respondent out of this Honorable Court; that thereafter a return was filed in behalf of your respondent denying the material allegations of the application theretofore filed in behalf of said Wong Doo and alleging that the hearings had before respondent as to the deportation of the petitioner therein were conducted in accordance with law and the regulations of the Department of Labor and that the issuance of the warrant of deportation thereafter constituted no abuse of discretion on the part of the Secretary of Labor; that issues having been joined, the cause was heard before this Honorable Court on November 3, 1920, [fol. 16] and that on December 14, 1920, a final decree denying the application of said Wong Doo for a writ of habeas corpus was entered by this Honorable Court.

Your respondent further says that thereafter an appeal from said final decree was taken by the petitioner herein to the United States Circuit Court of Appeals for the Sixth Judicial Circuit; that the record of the proceedings in said case No. 10487 and briefs in behalf of the petitioner and of your respondent were duly filed in said Circuit Court of Appeals and the cause was thereafter argued orally by counsel to said Circuit Court of Appeals and that on or about the 28th day of June, A. D., 1922, said cause was decided by said United States Circuit Court of Appeals for the Sixth Judicial Circuit and the judgment of this Court denying the application of said Wong Doo for a writ of habeas corpus, was by said Circuit Court of Appeals affirmed and a mandate thereunder was filed on or about the 3rd day of August, 1922. A copy of the transcript of the record before the United States Circuit Court of Appeals in said proceeding is hereto attached and marked Exhibit "C."

Your respondent therefore says that any and all rights of the petitioner herein to a writ of habeas corpus have been fully and completely determined by this Honorable Court and the Circuit Court of Appeals for the Sixth Judicial Circuit.

Wherefore, your respondent prays that the petition herein be dismissed and that he may be allowed to go hence with the body of the petitioner Wong Doo.

J. Arthur Fluckey, Inspector in Charge.

Jurat showing the foregoing was duly sworn to by J. A. Fluckey omitted in printing.

[fol. 17] EXHIBIT "A" TO AMENDED RETURN—Omitted; printed side page 11 ante

---

[fol. 18] EXHIBIT "B" TO AMENDED RETURN—Omitted; printed side page 12 ante

---

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE REPLY INSTANTER—Entered Sept. 18, 1922, by D. C. Westenhaver, Judge

In this cause leave is hereby given the petitioner to file his reply to the amended return herein instanter, and said reply is accordingly filed.

IN UNITED STATES DISTRICT COURT

REPLY—Filed Sept. 19, 1922

To the Honorable District Court of the United States for the Northern District of Ohio:

Now comes Wong Doo, the petitioner in the above entitled matter, leave of court having been first obtained, and replying to the Amended Return of J. Arthur Fluckey, Inspector in Charge of the Immigration Service of the Department of Labor of the United States, at Cleveland, Ohio, says that he admits that on the 29th day of June, A. D. 1920, the petitioner herein filed his application for a writ of habeas corpus and that the petition contained substantially the allegations set forth in respondent's amended return; that on July 1, 1920, an alternative writ of habeas corpus was issued out of this Honorable Court and that, thereafter, a return was filed as set forth in respondent's Amended Return and that the case was heard before this Honorable Court on November 31, 1920, and that on December 14, 1920, a final decree was entered by this Honorable Court denying the application of Wong Doo for

a writ of habeas corpus, from which an appeal was taken and judgment rendered as alleged.

Petitioner further says that at the aforesaid hearing upon his application on November 3, 1920, the sole and only question that was argued and considered by this Honorable Court was the jurisdic- [fol. 20] tional question as to the right of the Department of Labor to try and order the deportation of petitioner by departmental proceedings solely, under the alleged authority of the Immigration Act of 1917, and that the sole question considered by this Honorable Court was the jurisdictional question and that no record of the departmental proceedings except the warrants of arrest and orders of deportation were introduced for consideration by this Honorable Court, there being no record of the evidence and conclusions from such by the departmental authorities at any time considered by this Honorable Court.

This petitioner further says that the question as to the fairness of the hearing before the Department of Labor of this petitioner and the correctness of the conclusions of law drawn from the facts before said department and the manner in which said hearings before said department were conducted were never considered by this or any other court at any time and that these questions are raised for determination by the present application of this petitioner.

This petitioner further says that the question as to the right of the Department of Labor to seize and take possession of alleged papers and letters belonging to this petitioner from his possession has not been raised as an issue at any time in any proceeding and is now presented for the first time by this petitioner to this Honorable Court.

This petitioner further says that the consideration of his application for a writ of habeas corpus in former proceedings and his discharge under the first application were directed only to the jurisdictional question and the right of the Department of Labor to exercise jurisdiction and solely try and determine the right of this petitioner to be and remain in the United States.

Further replying this petitioner denies each and every other allegation in the respondent's Amended Return save and except such as are admissions of allegations contained in petitioner's petition and save such as are herein expressly admitted to be true.

This petitioner further avers that the hearing before the Department of Labor was arbitrary, unjust and unfair in the *manners* set forth in his petition; that the seizure of papers and letters alleged to belong to him and seized as a basis for the order of deportation was contrary and in violation of the constitution of the United States and that the conclusions of the Department were unwarranted and [fol. 21] not according to law and that there was no evidence upon which to base an order of deportation before the Department of Labor.

Wherefore petitioner prays that the hearing and record before this Honorable Court may be fairly determined and that he may be

discharged from custody and for all other and further relief which by reason of the premises he may be entitled to.

Wm. J. Dawley, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by Wong Doo omitted in printing.

In United States District Court

Hearing on Amended Return—Entered Sept. 26, 1922, by D. C. Westenhaver, Judge

This day this cause came on to be heard on the amended return and was argued by counsel, submitted to the Court and taken under advisement by the Court.

In United States District Court

[fol. 22] Opinion of Court—Filed Oct. 6, 1922

Westenhaver, *District Judge:* This case presents the same history and involves the same issues and questions of law as were involved in Wong Sun vs. J. A. Fluckey, No. 11569, this day decided. The writ of habeas corpus is denied and the defendant is remanded into custody, for the reasons therein stated.

D. C. Westenhaver, Judge.

October 6, 1922.

In United States District Court

Order Denying Writ of Habeas Corpus—Entered October 6, 1922, by D. C. Westenhaver, Judge

This day this cause having been submitted to the Court on a previous term, on application for a writ of habeas corpus, on consideration thereof the Court denied said application and orders that the petition be dismissed at the costs of the petitioner, and that the said petitioner be remanded into the custody of J. Arthur Fluckey, Inspector in Charge of the Bureau of Immigration, at Cleveland, Ohio, for further disposition, and an exception is allowed.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND WAIVER—Filed Oct. 10, 1922

To the Honorable Judge D. C. Westenhaver and to the Clerk of the United States District Court and the Honorable E. S. Wertz, United States Attorney:

You will take notice that the petitioner in the above entitled case hereby appeals to the United States Circuit Court of Appeals for [fol. 23] the Sixth Circuit of the United States of America on the order, judgment and decree entered herein on the 6th day of October, 1922, dismissing the application for a writ of habeas corpus hereinbefore filed and declaring the petitioner to be unlawfully within the United States and ordering his deportation according to the law and in pursuance with the order of the Acting Secretary of the Department of Labor as more fully appears in the assignment of errors filed herein.

Wm. J. Dawley, Attorney for Petitioner.

Receipt of copy of above acknowledged 10/9/22.
B. W. Henderson, Asst. U. S. Atty.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Oct. 10, 1922

To the Honorable District Court of the United States for the Northern District of Ohio, Eastern Division:

The above named Wong Doo, petitioner, conceiving himself aggrieved by the decree, judgment and order made and entered on the 6th day of October, 1922, in the above entitled cause, does hereby appeal from said decree, judgment and order to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in said assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree, judgment and order were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

Wm. J. Dawley, Attorney for Petitioner.

[fol. 24] In United States District Court

Assignment of Errors—Filed Oct. 10, 1922

To the Honorable District Court of the United States for the Northern District of Ohio, Eastern Division:

The petitioner in this action, in connection with his petition for appeal, makes the following assignment of errors, which he avers occurred upon the application for a writ of habeas corpus and the refusal of the same upon consideration thereof by this Court, to-wit:

1. That the Court erred in holding the doctrine of res adjudicata required the Court to deny as a matter of law the present application and refusing to consider the same although the grounds set forth and relied upon in the present application have never been considered in any other hearing and were sufficient to require the discharge of the petitioner.

2. That the judgment of the Court is contrary to law in that the application showed conclusive reasons for granting the same.

3. That the refusal of the application was manifestly error as appears from the record.

4. That there are errors of law apparent upon the record.

5. That the Court erred in not sustaining the right of the defendant in discharge.

Wm. J. Dawley, Attorney for Petitioner.

In United States District Court

Order Allowing Appeal—Entered Oct. 10, 1922, by D. C. Westenhaver, Judge

This day came the petitioner and presented his petition for appeal, together with the assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows and orders an appeal in this case to the United States Circuit Court of Appeals for the Sixth Circuit; and it is further ordered that the petitioner give bond according to law, to the approval of the Clerk of this Court, in the sum of $250.00.

[fols. 25 & 26] Bond on Appeal for $250.00—Approved by Westenhaver, J.; omitted in printing

[fols. 27 & 28] CITATION IN USUAL FORM SHOWING SERVICE ON B. W. HENDERSON—Omitted in printing

---

[fol. 29] IN UNITED STATES DISTRICT COURT

STIPULATION WITH REGARD TO RECORD ON APPEAL—Filed Oct. 30, 1922

To the Honorable the District Court of the United States for the Northern District of Ohio:

Whereas, in all of the above causes there is only one record of the Immigration Department of the hearings and exhibits relating to the deportation proceedings against the above named petitioners, and

Whereas, the facts and law in all of the above cases are in most respects similar and the cases were consolidated for hearing before the United States District Court.

It is hereby stipulated by counsel for the above named petitioners and by counsel for the respondent as follows:

That the incomplete record of the departmental hearing marked Plaintiff's Exhibit A and made by reference a part of the petition of each of the applicants may be omitted from each of the cases:

That the complete departmental record may be withdrawn from the files of the United States District Court and forwarded to the Clerk of the United States Court of Appeals for the Sixth Circuit as Government's Exhibit D for use at the hearing of these cases in said Circuit Court of Appeals.

That the court's opinion in the cases may be printed in the record in one of the cases and incorporated by reference in the records of the other cases in the United States Circuit Court of Appeals for the Sixth Circuit.

It is further stipulated that the cases may be consolidated for hearing in the Court of Appeals and that briefs in any one of the cases may be used and considered as briefs in each and all of the cases and as a compliance with the rules thereto relating.

Wm. J. Dawley, Counsel for Appellants. Berkeley W Henderson, Asst. U. S. Atty., Counsel for Appellees.

[fol. 30] IN UNITED STATES DISTRICT COURT

ORDER WITHDRAWING EXHIBITS—Entered Oct. 30, 1922, by Judge Westenhaver

It appearing to the Court that plaintiff's Exhibit A is an incomplete record of the hearings in the above entitled cases before the Immigration Department and it further appearing that the com-

plete record, by agreement of counsel, can be certified as a substitute for plaintiff's Exhibit A to the Circuit Court of Appeals, it is ordered by the Court that the complete record be withdrawn from the files of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit as Government's Exhibit D, with the transcript of record in these cases, for use at the hearing of these cases in said Circuit Court of Appeals.

It further appearing to the Court that defendant's Exhibit C, being the record of the United States Circuit Court of Appeals for the Sixth Circuit, cannot be conveniently duplicated, it is ordered by the Court that said exhibit be withdrawn from the files of this Court and forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, with a transcript of record in these cases, for use at the hearing of these cases in said Circuit Court of Appeals.

IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed Oct. 30, 1922

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the appellate court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

Wm. J. Dawley, Attorney for Plaintiff. Berkeley W. Henderson, Attorney for Defendant.

[fols. 31 & 32] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Oct. 30, 1922

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Application for Writ of Habeas Corpus.
Order Allowing Writ of Habeas Corpus.
Writ of Habeas Corpus.
Return.
Hearing on Application.
Hearing on Application for Leave to File Amended Return.
Amended Return of Immigration Inspector.
Leave to File Reply.
Reply.
Hearing on Amended Return.

Exhibits except Plaintiff's Exhibit A and Defendant's Exhibit C.
Memorandum Opinion (See Wong Sun case No. 11569).
Final Decree.
Notice of Appeal.
Petition for Appeal.
Assignment of Errors.
Order Allowing Appeal.
Bond on Appeal.
Citation.
Stipulation with regard to record. (See case No. 11569.)
Order withdrawing certain Exhibits. (See case No. 11569.)
Stipulation re printing of record.
Precipe for Transcript.
Certificate.

And deliver all papers to The Gates Legal Publishing Company for printing.

Wm. J. Dawley, Attorney for Petitioner.

[fol. 33] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF CLERK

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing printed pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal, in accordance with the precipe for transcript filed herein, the originals of which, except certain exhibits withdrawn by leave of Court, remain in my custody as Clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Cleveland, in said District, this 10th day of November, A. D., 1922, and in the 147th year of the Independence of the United States of America.

B. C. Miller, Clerk, by M. E. Bauman, Deputy Clerk. (Seal.)

[fol. 34] Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit

APPEARANCE OF COUNSEL—Filed Nov. 14, 1922

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Appellant.

W. J. Dawley, 1208 Engineers Bldg., Cleveland, O.

CAUSE ARGUED AND SUBMITTED—OCTOBER 8, 1923—BEFORE KNAPPEN, DENISON AND DONAHUE, C. J. J.

These causes are argued by Mr. William J. Dawley, for the Appellants and by Mr. M. A. McCormack, Assistant United States Attorney, for the Appellee and are submitted to the Court.

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Filed Nov. 12, 1923

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed Nov. 12, 1923

[fol. 36] KNAPPEN, Circuit Judge: The four appellants, all of whom are of Chinese descent and none of whom claim United States citizenship, were arrested in August, 1915, as Chinese aliens unlawfully within the United States and, as claimed by the Commissioner, thus subject to deportation under the Immigration Act of 1907 (34 Stat. 898). Under habeas corpus proceedings, they were discharged, conformably to the decision in United States v. Woo Jan (245 U. S. 552), because entitled to a judicial hearing, as distinguished from a summary or administrative method. They were thereupon re-arrested for deportation, under the general Immigration Act of 1917 (39 Stat. 874; Comp. St. Ann. Supp. 1919, sections 4289¼a-4289¼u). Proceedings in habeas corpus, hereupon instituted by appellants, were dismissed by the district court, whose action was affirmed by this court (Woo Shing v. United States, 282 [fol. 37] Fed. 498), upon the authority of Ng Fung Ho v. White, Commissioner, 259 U. S. 276, wherein it was held that Sec. 19 of the Immigration Act of 1917 did not preserve the right to a judicial hearing in respect to deportation after May 1, 1917, of Chinese found here, or who shall have entered, in violation of the exclusion acts. Appellants thereupon severally instituted in the district court

below new proceedings in habeas corpus, attacking the deportation order upon various charges of unfairness and irregularity in the departmental hearing awarded, and challenging the sufficiency of the evidence to sustain the findings made. By his return to the writ of habeas corpus the inspector not only traversed the allegations of the petition relative to asserted insufficiency of proof and unfairness and lack of impartiality of the proceedings on the administrative hearing, but invoked the dismissal by the district court of the former proceeding in habeas corpus, and the affirmance of that action by this court, as a bar to the present proceeding. Judge Westenhaver discharged the writs of habeas corpus, and ordered petitioners remanded into the custody of the immigration authorities, upon the ground that the previous discharge of the writs by the district court, and the affirmance thereof by this court, work a final adjudication of petitioners liability to deportation. Wong Sun v. Fluckey, Inspector, 283 Fed. 989. These appeals are from the respective orders discharging the writs.

Appellants contend, first, that the doctrine of res judicata does not apply to an order discharging the writ of habeas corpus, and, second, that in the former proceeding the sufficiency of the hearing before the immigration officer and the conclusions there reached were not considered by either the district court or this court.

The former petition for habeas corpus, the proceedings in which were so dismissed by the district court, and whose action was affirmed by this court (282 Fed. 498), not only asserted and relied upon the denial to petitioner of a judicial hearing, respecting his right to remain in the United States, but also, in the language quoted in the [fol. 38] margin,[1] directly attacked the sufficiency of the administrative hearing actually had as unfair and not impartial to the petitioner.

The inspector's return to the writ, in the case of each appellant, not only denied petitioner's right to a judicial hearing, but, in the language we have set forth in the margin,[2] joined issue upon the allegations of the petition regarding the character of the adminis-

[1] "Your petitioner further alleges that said so-called hearing conducted before said J. Arthur Fluckey, inspector in charge of the Immigration Department, Cleveland District, was manifestly unfair and not impartial to this petitioner, but on the contrary was examined on several occassions by said J. Arthur Fluckey and his assistants without the privilege of counsel and found by said Fluckey to be unlawfully in the United States, solely from the testimony of witnesses, cross-examination of whom was not had by your petitioner's counsel."

[2] "Your respondent alleges that such a hearing was duly had and opportunity was given the petitioner to show cause why he should not be deported in view of the facts proved; and said petitioner was represented by counsel in said hearing; that the petitioner was given full opportunity to produce the evidence which he desired to produce; that there was no abuse of the discretion lodged by law in the Secretary of Labor; that said hearing was had in accordance with law and in accordance with the regulations of the Department of Labor. Your respondent denies each and every allegation of the petition with the exception of that which has been specifically admitted and alleges that said petitioner is now held in lawful custody, etc."

trative hearing had. While petitioner's charges in that respect were not as definite and detailed as in the application before us, they were sufficient, especially in view of the issue joined, to permit proof thereof and decision thereon. It is true that, in the former proceeding, the sufficiency of the hearing before the Immigration Officer, and the conclusions there reached, were not considered by the district court, nor, at least substantially, by this court, but that was because proof in support of petitioner's allegations in those respects was not presented.[3] But it is a common-place that in ordinary judicial proceedings the final determination of the court is a conclusive adjudication not only as to matters actually argued and decided, but also as to all matters which might have been so considered and decided. New Orleans v. Citizens Bank, 167 U. S. 371, 397; So. Pacific R. R. Co. v. United States, 168 U. S. 1, 48.

At the common law a refusal to discharge on habeas corpus one in custody on a criminal charge was no bar to further and repeated applications of the same nature, even upon the identical grounds existing or alleged on the first application. The prominent considerations leading to this state of the law seem to have been that a proceeding by habeas corpus—which was the "writ of freedom"—is purely summary, without provision for framing or trying issues of fact (the officer's return to the writ being taken as true), [fol. 39] and without right of review. Today, generally, and in the federal courts specifically, the hearing in court of a petition for habeas corpus is essentially a judicial proceeding, involving a trial of the truth of the officer's return when challenged on the facts, and hearing on the questions of law involved, with a right of review by an appellate court (United States v. Fowkes, C. C. A. 3, 53 Fed. 15; In re Graves, C. C. A. 1, 270 Fed. 181), not merely by writ of error, but by appeal, bringing up for review on both law and facts the entire record presented to the court below. In re Neagle, 135 U. S. 1, 41-42. As a practical proposition, the basis for the old common-law rule has thus disappeared.

On the question of res judicata, as involved here, we find no decisions of the Supreme Court of the United States in point. In re Jugiro, 140 U. S. 291, cited by appellant, the appeal was from a denial by the federal circuit court of a second application for habeas corpus, made after the affirmance by the Supreme Court of a former denial by the circuit court, with remand of petitioner to the state court. The second petition presented a matter occurring after the affirmance by the Supreme Court, also several other matters of which petitioner claimed to have been ignorant when the first application

[3] We of course accept as correct the statement of counsel for appellants that the course taken upon the previous application was followed because of differing interpretations by the United States courts of the jurisdiction of the Immigration Department under the Act of 1917, and for economical reasons as well, and in the belief that the Immigration Department did not have jurisdiction. For purposes of this hearing, we disregard the comments (partly obiter) made in the concluding paragraph of our opinion on review of the former application (282 Fed., at p. 502), upon the departmental record therein referred to.

was made. The Supreme Court held that the matter later occurring did not render the action of the state court void, and that the other errors alleged could not be reached by habeas corpus. There was thus no second hearing of any question once decided, or that might have been decided, and the question of res judicata was not raised or presented, nor was there room therefor.

In Rose v. Roberts (C. C. A. 2), 99 Fed. 948, an order of the circuit court dismissing the writ of habeas corpus had been affirmed upon the holding that the judgment of a court martial can not be reviewed by a writ of habeas corpus, except to determine the question of jurisdiction, which was found to extend to the action of the court martial. In Carter v. McClaughry, 105 Fed. 614, the Circuit Court for the District of Kansas held, as applied to the above stated action of the Circuit Court for the Southern District of New York and of the Court of Appeals for the Second Circuit, that the denial of a writ of habeas corpus by the federal courts of one circuit does not render questions determined res judicata, so as to preclude their re-examination by the courts of another circuit in subsequent habeas [fol. 40] corpus proceedings instituted therein by the same petitioner. The Supreme Court, in dismissing an attempted review of the judgment of the Circuit Court for the Southern District of New York, did not pass upon the questions of fact and the validity of the conviction and sentence, but held merely that the Supreme Court would not entertain a direct appeal therefrom. 177 U. S. 496. The affirmance by the Supreme Court (183 U. S. 365) of the action of the District Court of Kansas did not involve or consider the question of res judicata, which manifestly could not arise in the case.

We therefore see no basis for the suggestion that the Supreme Court, by its action in either of the cases cited, impliedly recognized the right of repeated review.

We think the same is true of Chin Fong v. White, C. C. A. 9, 258 Fed. 849, also cited by appellant, in support of his denial of the doctrine of res judicata. The first application for habeas corpus involved the contention that the construction of a treaty was involved. Ex parte Chin Fong, 213 Fed. 288. An appeal to the Supreme Court was dismissed on the ground that appellant's rights depended upon the statutes regulating Chinese immigration and not upon a construction of treaty provisions; and that there was thus no right of direct appeal from the District Court to the Supreme Court. Chin Fong v. Backus, 241 U. S. 1. The District Court then granted appellant permission to file a new petition for habeas corpus, basing his claim to relief upon his alleged statutory rights, and not upon claimed treaty rights. Chin Fong v. White, supra, was a review of the order made under the second proposition. No question of res judicata was thus necessarily involved.

Elsewhere in the federal courts the trend of decision seems to favor the rule of res judicata when the right of review exists. In Ex parte Kaine, 3 Blatchf. 1; Fed. Case No. 7957, 14 Fed. Cas. 78; and in In re Kaine, 14 Fed. Cas. 82, No. 7597a, the decision denying the bar of former adjudication was rendered before any review of

an order in a habeas corpus case was permitted. The decision was based solely on the common-law rule as it stood at the time of the adoption of the Constitution of the United States.

In In re Kopel, 148 Fed. 505, Judge Hough entertained a petition in habeas corpus (an extradition case) notwithstanding a previous denial by a justice of the Supreme Court of the state, from whose decision, as stated by Judge Hough, "no appeal seems to have been [fol. 41] taken, if such appeal be permissible," Judge Hough basing his conclusion upon the absence of federal statute limiting the right of successive petitions. It does not appear what the decision would have been had the New York practice permitted an appeal, or if the prior dismissal had been made by the same federal court. The case was not reviewed. In United States v. Chung Shee, C. C. A. 9, 76 Fed. 951, a judgment of the District Court, discharging on habeas corpus a Chinese immigrant detained for deportation, as not entitled to enter was held conclusive of the right of entry, and not subject to re-examination by subsequent proceedings for deportation; and this decision has recently been followed by District Judge Neterer in Ex parte Gagliardi, 284 Fed. 190.[4]

In Ex parte Cuddy, 40 Fed. 62, Mr. Justice Field, sitting at the circuit, in dismissing a writ of habeas corpus and remanding the prisoner, held, as stated in the headnote, that "where a petitioner for a writ of habeas corpus appeals to the United States Supreme Court from a judgment of the Circuit Court denying his application, voluntarily omitting a material portion of his case, he can not, after failing on the appeal upon the record presented, renew his application before another court or justice of the United States, upon the same record, with the addition of the matter thus omitted, without first having obtained leave for that purpose from the Supreme Court. The question is entirely different when subsequently occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration." In Ex parte Moebus, 148 Fed. 39, 40-41, the late Circuit Judge Putnam held, as stated in the headnote, that "in jurisdictions where appeals have been provided for in habeas corpus cases, it has come to be the rule, either as one of law or of practical administration, that a judge is not required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his remedy by appeal"; while in Lui Lum v. United States, C. C. A. 3, 166 Fed. 106, an order of a United States District Judge of New York, denying the right to a discharge, was expressly held res judicata as to a subsequent application in habeas corpus to a District Judge in Pennsylvania.

[fol. 42] In the state courts a contrariety of decision is found. Among the cases denying the conclusiveness of former adjudication

[4] In the Chung Shee case the district court (71 Fed. 279) had distinguished, as to the applicability of res judicata, between an order remanding and an order discharging the petitioner; but this distinction is not mentioned in the decision of the Circuit Court of Appeals, which on its face would apply equally to a decision against the petitioner's right.

are Bradley v. Beetle, 153 Mass. 154;[5] Miskimmins v. Shepard, 8 Wyo. 392, 404;[6] People v. Brady, 56 N. Y. 183, 191-2;[7] Weir v. Marley (Mo.), 6 L. R. A. 672, 674.[8] In People v. Siman, 284 Ill. 28, it is said that there is no statutory review of an order refusing to discharge on habeas corpus. In re Leutzler v. Perry, 18 O. C. C. 826, where it was held that an order by a judge refusing to issue a writ of habeas corpus (not an order discharging the writ after hearing) was not res judicata as to a second application to another court, attention was called to the facts that the Ohio statute did not authorize review of an order refusing to issue the writ, but only of an order discharging the writ upon a hearing, and that even in the latter case the permissible review, being only by writ of error, without provision for bringing to the attention of the reviewing court the real facts upon which petitioner claimed to be entitled to his discharge, was not a full, complete and adequate remedy in all cases. The Circuit Court decision in the Luetzler case does not seem to have been reviewed.

Among the decisions affirming the conclusiveness of a former adjudication are State v. Whitcher, 117 Wis. 668;[9] State v. Hebert, 127 Tenn. 220, 245;[10] Perry v. McLinden, 62 Ga. 598, 603;[11] Ex [fol. 43] parte Justus, 26 Okla. 101.[12]

The text books cited are generally not inconsistent with the ex-

---

[5] This case holds that a former discharge is not "as matter of law, a bar to subsequent proceedings of the same kind founded on the same facts." The question whether the court on the second application has discretion to hear or refuse to hear a new application on the same facts was not passed upon.

[6] This decision seems to be based in part upon the Wyoming statute, as being inconsistent with the idea that a former denial of the writ is a final adjudication.

[7] It does not appear whether or not the statute provided for an appeal. In at least three states besides Wyoming, statutes govern the practice of subsequent applications for habeas corpus. In re Udell, 171 Ga. 599; Ex parte Hamilton, 65 Miss. 98; Ex parte Rossan (Texas), 5 So. W. Rep. 666.

[8] It is said that "the serious objection to the conclusiveness of a judgment of habeas corpus in such causes [custody of children] would be removed by a provision for review by appeal or writ of error."

[9] This case holds that in view of the statute giving a right of appeal, the decision upon the application is res judicata to be set aside by some subsequent proceeding in the same matter, according to the legal procedure for reviewing judicial errors.

[10] The right to a second application for habeas corpus, after affirmance by the Supreme Court of an order of discharge, was limited by that court to cases where new and vitally material facts have developed after the decision of the Supreme Court, which were unknown to petitioner and could not have been discovered by the exercise of reasonable diligence, and which would have deterred the court from dismissing the petition had they been known and presented to the court.

[11] Perry v. McLinden, supra, holds a refusal to discharge a prisoner res judicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not,—especially where the imprisonment is on civil process; this holding being based on the existence of right of review.

[12] It was said that "while the order of the Criminal Court of Appeals denying the writ is not a bar to a further application to this court, still its order made in the premises is entitled to consideration, and it appearing that the conclusion reached is correct, it will be followed by this court."

istence of res judicata where there is statutory provision for review. The citation of Foster's Federal Practice does not in terms cover cases of statutory appeal and affirmance thereunder. Brown on Jurisdiction, Sec. 111, states that "the doctrine of res judicata has no application to this proceedings [habeas corpus] except where the statute provides for an appeal, which is the case in some states." Bailey on Habeas Corpus, Sec. 59, says: "Where, however, a statute exists which authorized a review of the proceedings upon appeal or writ of error, the determination being held res adjudicata, it would follow that it would constitute a bar to the prosecution of such action" (false imprisonment for the same cause).

In this state of the law, and regardless of decisions asserting the doctrine of res judicata as applied to the right to custody of children or insane persons[13] (Cormack v. Marshall, 211 Ill. 519; McMahon v. Meade, 30 S. D. 515; In re Holt, 34 Cal. App. 290), and in view of the federal statute providing for appeal, the fact of appeal and affirmance thereunder, and that the second application presents no considerations unknown to appellants or which could not have been presented upon the first application, and without reference to the fact that our consent to the second application was not obtained or requested,[14] we are constrained to hold that the final judgment upon the previous application for habeas corpus constituted a conclusive bar to the second application. We think this conclusion supported by both reason and the weight of authority.

The orders of the District Court discharging the respective writs of habeas corpus are affirmed.

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed Dec. 11th, 1923

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes the appellant, Wong Doo, and moves this Honorable Court for an order staying the mandate of the Circuit Court of Appeals in this cause until and including the 12th day of January, 1924, and for his reasons says that his counsel are preparing a petition for writ of certiorari which they intend to file in the Supreme Court of the United States, to have reviewed the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit, filed in the above entitled cause, and for the further reason that counsel intend to make application to this Honorable Court for leave

---

[13] Such cases are not entirely destitute of analogy to deportation proceedings, as involving a status other than an imprisonment for an offense.

[14] Compare Raydure v. Lindley—C. C. A. 6—268 Fed. 338, 340; and other cases cited in Amer. Foundry, Etc., Co. v. Wadsworth—C. C. A. 6—290 Fed., at p. 196.

to file an application for a writ of habeas corpus submitting therewith his brief.

Respectfully submitted, W. J. Dawley, Counsel for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS

BRIEF

Counsel in support of the foregoing motion desire to state that [fol. 45] they have not sufficient time within which to prepare a petition for certiorari and brief unless this stay is granted, and that the purpose is not to unduly postpone the date of departure of this appellant under the order of deportation, but to present what counsel consider to be a just and meritorious contention before the United States Supreme Court upon a question of law that is decided differently in different jurisdictions of the United States, and that has not been finally determined by the United States Supreme Court.

Counsel also desires to state that they are of opinion, if the departmental record were considered, this appellant would be entitled to a discharge from custody by virtue of a former decision of this court pertaining to the status of merchants and sons of merchants of the Chinese race, who, after they are domiciled in this country, are compelled by force of circumstances to temporarily engage in the occupation of a laborer instead of continuing that of a merchant.

It is submitted that the delay so far caused in this litigation has been due more to the unsettled state of the law regarding jurisdiction of the department of labor and not to any wilful act of counsel for this Chinaman.

Respectfully submitted, W. J. Dawley, Counsel for Appellant.

[fol. 46] UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed Dec. 12, 1923

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari, is hereby granted subject to the following condition: that appellant shall within 30 days from the date of this order file his petition for the writ in the Supreme Court and, upon giving notice to opposing counsel of date for submission as required by Supreme Court Rule 37, present the petition in open court on the first motion day thereafter and within five days after the first motion day following the expiration of said 30 day period, file in this court proof of such filing, notice and presentation of petition. Unless this condition is complied with or its non-observance sanctioned by the Supreme Court, the mandate herein will issue either upon the court's own motion and without notice, or on motion of opposing party upon notice, as to the court

may seem best; but in the event of compliance with the condition imposed or of such sanctioned non-observance the mandate will be stayed until final action in the case is taken by the Supreme Court.

[fol. 47] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLERK'S CERTIFICATE

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of transcript of record and proceedings in the case of Wong Doo, vs. United States of America, No. 3832, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 4th day of January, A. D. 1924.

Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 48] SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

February 18, 1924.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Sixth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

It is further ordered that this cause be, and the same is hereby, placed on the summary docket and assigned for argument on Monday, April 7th next, after the cases heretofore assigned for that day.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 736

WONG DOO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND NOTICE OF PRESENTATION OF PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JACKSON H. RALSTON,
GEORGE W. HOUK,
Evans Building, Washington, D. C.,
Attorneys for Petitioner.

WM. J. DAFFRON,
Cleveland, Ohio,
Of Counsel.

T. H. BELAND & SONS, 710 Fourteenth Street, N. W., Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. ———.

WONG DOO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Wong Doo, respectfully represents:

I.

That petitioner is a Chinese person who was admitted at San Francisco, California, on January 25, 1915, as the minor son of a Chinese merchant, Wong Sun. He lived with his father and brother, Wong Fee, in San Francisco, California, where his father,

who had re-entered the United States in August, 1914, as a domiciled merchant, carried on a mercantile business as a partner and merchant in the firm of Chong Lee and Company.

In April, 1915, petitioner with his father, Wong Sun, and his brother came to Cleveland, Ohio, for the purpose of establishing a mercantile business, but residing temporarily at a Chinese laundry.

II.

In August, 1915, petitioner with his father and brother were arrested in Cleveland, Ohio, and summarily tried by the Immigration authorities under the provisions of the Immigration Act of February 20, 1907, charged with a violation of the Chinese Exclusion Laws in having fraudulently secured admission to the United States. An order of deportation on April 5, 1916, was made for petitioner, his father, brother and another Chinaman, Chan Yim, also found in the laundry. All were discharged from custody under that order on a writ of habeas corpus March 28, 1918, following the decision of the United States Supreme Court in United States vs. Woo Jan, 245 U. S. 552. The only question considered and argued in the habeas corpus hearing was as to the jurisdiction of the Department of Labor in the cases.

III.

Petitioner with the other Chinamen was rearrested upon new warrants under Section 19, General Immigration Act, February 5, 1917, charged with violation of the Chinese Exclusion Acts and

an order of deportation issued based upon the evidence of the former hearing. Petitioner presented to the United States District Court for the Northern District of Ohio, Eastern Division, his application for a writ of habeas corpus attacking the validity of an executive instead of a judicial hearing. On December 14, 1920, his application was denied. The only question argued and considered was the validity of an executive hearing although the question as to the fairness and regularity of the executive hearing was raised and put in issue by the pleadings without, however, attaching to the petition a copy of the departmental record of the hearings.

IV.

The United States Circuit Court of Appeals for the Sixth Circuit on June 28, 1922, in accordance with the decision of the United States Supreme Court in Ng Fung Ho vs. Edward White affirmed the judgment of the District Court, considering only the question as to the validity of an executive hearing.

V.

Petitioner on August 8, 1922, made application to the United States District Court, Northern District of Ohio, Eastern Division, for a writ of habeas corpus based upon the grounds that the proceedings before the Immigration authorities were unfairly and irregularly conducted, that certain letters and documents were taken from the possession of petitioner and used against him, and that the Immigra-

tion Authorities applied erroneous conclusions of law to the facts and wrongly held as a proposition of law that the performance of manual labor in August, 1915, by a Chinaman who had re-entered the United States a year previous as a domiciled merchant and had engaged in business as such for at least six months thereafter would constitute a fraudulent re-entry and affect his minor son's admission as fraudulent.

By an amended return, the United States raised the doctrine of res judicata as a bar to this action, and on this ground, the District Court denied the application.

VI.

The United States Circuit Court of Appeals for the Sixth Circuit on December 12, 1923, affirmed the judgment of the District Court, holding that the principles of res judicata operated as a bar to this application.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding the said court to certify to this court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled "Wong Doo, Appellant, vs. The United States of America, Appellee," to the end that the said case may be reviewed and determined by this Court as provided by law.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner was discharged upon his first application for a writ of habeas corpus on March 28, 1918, for jurisdictional reasons and no question as to the fairness, regularity or legal conclusions by the Immigration Department in their proceedings was argued or decided.

The second application for a writ of habeas corpus upon petitioners re-arrest was disposed of by holding that the Immigration Department had jurisdiction under the Act of 1917 without presentation, argument or consideration of the nature of the proceedings before the Immigration Department or the conclusions of law made by Departmental officials.

The present application is based upon the nature of the Departmental procedure and conclusions of law reached which matters have never received consideration by any court.

The petitioner has been denied his present application upon the theory that the doctrine of res judicata applied.

Argument.

The writ of habeas corpus is of very ancient origin, antedating Magna Charta, and regarded as the greatest and most important remedy known to the law. Its origin and purpose differentiate it from other legal procedure so that for this reason the doctrine of res judicata would not apply.

The United States Supreme Court did not apply the doctrine of res judicata in the following cases wherein, after denial of one application, subsequent applications for the writ were made:

> Carter vs. McClaughry, 183 U. S., 365.
> In re Jugiro, 140 U. S., 291.

The Circuit Court of Appeals in Carter vs. McClaughry, 105 Fed. 614, held:

> "The denial of a writ of habeas corpus by the Federal Courts of one Circuit does not render the questions determined res judicata, so as to preclude their re-examination by the courts of another circuit in subsequent habeas corpus proceedings instituted therein by the same petitioner."

In Chin Fong vs. White, 258 Fed. 849, a second application for a writ of habeas corpus in a Chinese deportation case was permitted after denial of the first, where a different question of law was raised and decided.

The state courts of Massachusetts, New York and Ohio have followed this doctrine as to applicability of res judicata to the writ of habeas corpus. See Bradley vs. Bettle, 153 Mass. 154. People ex rel. Joeb Lawrence vs. John R. Brady, etc., 56 N. Y. 182, the case in in re Lutzler, 18 O. C. C., Rep. 826, where the court in the syllabus says:

> "Where an application for a habeas corpus has been refused by one court, another application to another court for such writ is ad-

missible, notwithstanding under Section 5751 R. S., such first decision might be reviewed on error."

The following text writers support the proposition that the doctrine of res judicata does not apply to habeas corpus proceedings where there has been a refusal to discharge on the writ.

The following text writers are relied upon:

Foster "Federal Practice, 6th Edition, Vol. 3, page 2358."

"The doctrine of Res Adjudicata does not apply to denials of application for the writ, and successive petitions may be presented to different judges who have power to entertain it, after the same prayer has been previously denied * * * ."

Bailey—"Habeas Corpus, Vol. 1, page 206, paragraph 59."

"As a general rule Res Adjudicata has no application to habeas corpus proceedings where there has been a refusal to discharge on the writ. That a refusal to discharge on one writ is not a bar to the issuance of a new writ."

"Corpus Juris, 29 C. J., page 179, Habeas Corpus, paragraph 203:"

"Of refusal to Discharge—(1) At common law—In a few jurisdictions, it is held, even in the absence of a statute so providing, that a refusal to release the relator in a habeas corpus proceeding is conclusive on a subsequent application as to all points presented or which might have been presented on the first application, at least where the imprisonment is in

> a civil case, or where the decision is subject to review on appeal, writ of error, or certiorari. But by the great weight of authority, the rule is, in the absence of a statute providing otherwise, that a refusal to grant a writ of habeas corpus, or a dismissal of the writ, or a remand of the relator to custody, or other refusal to discharge him, is not a bar to, or res judicata on, a subsequent application for the writ. In the absence of statutory restrictions, the person detained may make successive applications to every court or judge having jurisdiction."

The merit of the present application for a writ consists in this: that petitioner is being deported under an order based upon the erroneous conclusion of law that a Chinese merchant who has re-entered this country and carried on a mercantile business for several months can be later charged with having re-entered fraudulently simply because he is found in a Chinese laundry and charged with having labored there. The evidence adduced by the Department substantiates these facts and evidences the error in legal conclusions. Furthermore, the fairness and regularity of the Departmental hearing is challenged in this respect, that certain letters and papers were taken by the Immigration officers from the possession of petitioner's father and used against him over his objection.

That petitioner has not been dilatory in asserting his right is evidenced by the fact that he was first discharged, then by virtue of a change in the law, re-arrested upon the original complaint dressed up to suit the change. His second application was made

at a time when the jurisdictional question had not yet been determined by the highest court, but was differently interpreted by certain United States Circuit Court of Appeals and District Courts.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals holding the doctrine of res judicata a bar to the present application is erroneous and its consequences subversive of the purpose of the writ of habeas corpus. It should, therefore, be reviewed by This Court and reversed.

Dated, January 7, 1924.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioner.

WM. J. DAWLEY,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am of counsel for petitioner and that in my opinion the foregoing and annexed petition for a writ of certiorari is well founded as to matters of fact and as to questions of law, and is not interposed for delay.

Dated, January 7, 1924.

GEORGE W. HOTT,
Of Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. ———

———

WONG DOO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA,
RESPONDENT.

———

NOTICE OF PRESENTATION OF PETITION FOR WRIT OF CERTIORARI.

To Harry M. Daugherty, Attorney-General of the United States, and Assistant Attorney-General of the United States, Washington, D. C.

Sirs: You, and each of you, will please take notice that the petitioner above named, through his counsel, will present to the above named Court, on the 28th day of Jan, 1924, at the hour of twelve o'clock noon of said day, or as soon thereafter as his counsel can be heard, at the courtroom thereof, in the Capitol Building, in the City of Washington, District of Columbia, a petition for a writ of certorari.

Said petition will be based upon this notice, the accompanying petition for a writ of certiorari, and all of the papers and records on file.

Dated, January 17", 1924.

Yours, etc.,

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioner.

WM. J. DAWLEY,
Of Counsel.

Admission of Service.

Receipt of a copy of the foregoing petition for a writ of certiorari, and notice of presentation of the petition for a writ of certiorari is hereby admitted this 17th day of Jan, 1924.

ATTORNEY-GENERAL OF THE UNITED STATES,

Jas. M. Beck

SOLICITOR-GENERAL OF THE UNITED STATES,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 736.

WONG DOO, PETITIONER,

vs.

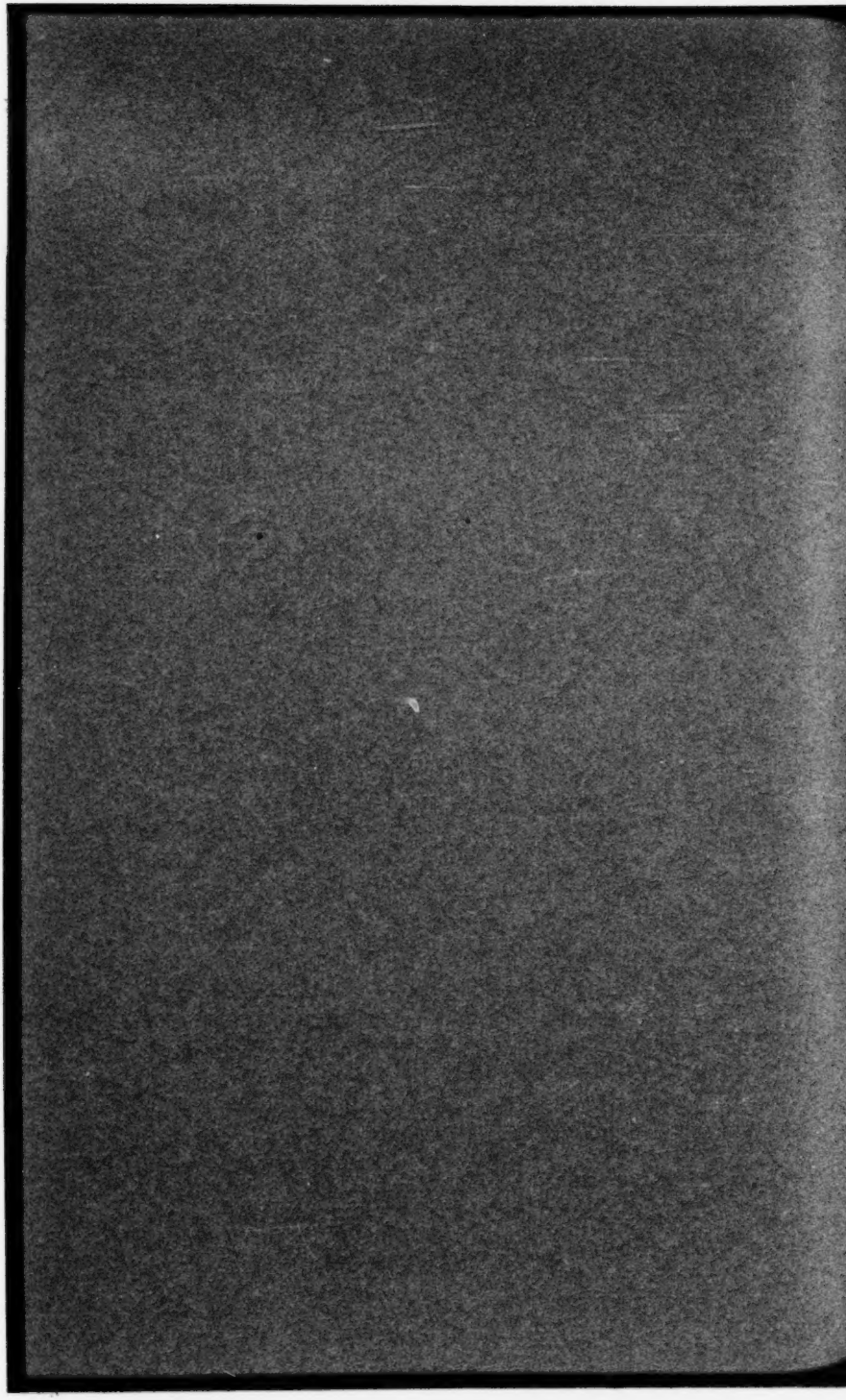
THE UNITED STATES OF AMERICA.

Supplementary Brief For Petitioner.

WANT OF DUE PROCESS OF LAW.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioner.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 736.

WONG DOO, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

Supplementary Brief For Petitioner.

WANT OF DUE PROCESS OF LAW.

We have filed with the clerk the copy of the proceedings of the Immigration service which was filed as Exhibit A to the alien's petition for a writ of habeas corpus in the United States District Court for the northern District of Ohio, August 8, 1922. We now point out succinctly some of the specific matters therein contained upon which the petitioner based his allegations that the hearing before the Department of Labor was unfair and not due process of law.

Immigration Rule.

Rule 22, subdivision 5, paragraph b of the Immigration Rules in force at the time of this hearing (but slightly amended and adopted as part of Rule 18, February 1, 1924) provides as follows:

> "At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same,

and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing, and to offer evidence to meet any evidence presented or adduced by the Government."

Condition of Evidence.

Wong Sun (father of Wong Doo), and Wong Fee (brother of Wong Doo), and another Chinaman, Chan Yim, were taken into custody on *August 3, 1915*, and on said date an Immigration Inspector (no attorney being present on behalf of the aliens) took statements from the following persons:

(1) Wong Sun, pages 1 and 7, Second Section of record.
(2) Wong Fee, page 3 do.
(3) Daniel A. Mack, page 4 do.
(4) Sarah Battaglia, pages 5 and 7 do.
(5) G. G. Fristoe, page 5 do.
(6) Chan Yim, page 5 do.
(7) J. J. Joyce, page 7 do.

On August 5, 1915, said inspector took statements from the following persons, no attorney being present and aliens not advised they were entitled to have an attorney:

(8) A. R. Homer, page 14, Second Section of record.
(9) David S. Cohen, page 14 do.
(10) W. W. Boyd, page 14 do.
(11) A. F. Drews, page 15 do.
(12) H. J. Friedman, page 16 do.

The foregoing statements were all made before Wong Doo was taken into custody and later incorporated in his record and over the objections of his attorney (pages 53, 54 and 57, Second Section of Record; and pages 8 to 13, First Section of Record), and the Immigration Inspector refused to present said witnesses for cross-examination on request of the alien's attorney (pages 10-13, First Section of Record), and they were not cross-examined.

(13) On August 13, 1915, a statement was taken from

Wong Sun Chew at San Francisco (page 68, 2d Section), no attorney being present on behalf of the alien and said witness was not presented for cross-examination.

(14) On August 17, 1915, Inspector Philip B. Jones, made an investigation in San Francisco and reported the same to his superior officer. (P. 59, 2d Section of Record.) Said report was incorporated in Wong Doo's record, over the objection of his attorney, and used as evidence against him, although the person making said report was not presented for cross-examination.

Wong Doo was taken into custody August 6, 1915, and some questions asked him (no attorney present) (page 22, 2d Section). The warrant was explained to him on August 10, 1915.

No further testimony was taken until January 15-17, 1916, when the following witnesses were examined in the presence of the alien's attorney:

Chan Yim, page 38, 2d Section of Record.
Wong Sun, page 43, do.
Wong Fee, page 53, do.
Wong Doo, page 55, do.

The testimony of these four witnesses is wholly favorable to the alien's claim.

On August 3, 1915, the Immigration Inspector, without any search warrant or other lawful authority searched the trunk and baggage of Wong Doo and the laundry at which he was residing.

The Inspector claims to have found certain letters and documents in said search, all of which were offered in evidence and incorporated in Wong Doo's record (pages 61 to 79, Second Section of Record), over the objection of his attorney, without any proof having been offered that said letters were written by or to or belonged to said Wong Doo.

Said letters were sent to New York for translation. There is nothing to show that the translation is correct, or that the person who made the translation was qualified, and he was not presented for cross-examination.

The translated copies were nevertheless incorporated into Wong Doo's record.

Wong Doo was discharged on a writ of habeas corpus March 28, 1918, on the ground that the Department had no jurisdiction to arrest him on a departmental warrant under the Immigration Act of February 20, 1907.

He was immediately re-arrested under the Immigration Act of February 5, 1917. No additional testimony was taken except some brief statements for the purpose of introducing in evidence the former record. The entire record, including all of the statements and exhibits presented on the first hearing were offered in evidence by the immigration authorities, and upon such record an order of deportation was issued.

Wong Doo, his father Wong Sun, and his brother Wong Fee, and another Chinaman were arrested at or about the same time. All four cases were heard and determined together. The testimony and exhibits relating to the several cases are all intermixed.

Wong Sun, the father of Wong Doo, first arrived in this country in February, 1899. He became a merchant shortly thereafter. He was a merchant in the Chung Kee Company of San Francisco for 5 or 6 years and up until 1905. He then became a member of the Chong Lee Company, San Francisco, and was a member of said firm at the time of his arrest in August, 1915. He made one trip to China of about 6 or 7 months, departing in November, 1913.

Wong Doo arrived in this country in January 25, 1915, and lived at his father's store in San Francisco until April, 1915, when his father took him to Cleveland and he was immediately placed in the public school (page 17, Second Section) where he attended school for several years.

Respectfully submitted.

JACKSON H. RALSTON,
GEORGE W. HOTT,
Attorneys for Petitioner.

No. 786

In the Supreme Court of the United States

OCTOBER TERM, 1957

WONG DOO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1923

WONG DOO, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT } No. 736

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT

This case comes before the Court upon a writ of certiorari issued to the United States Circuit Court of Appeals for the Sixth Circuit, to review a decree of that court affirming a decree of the District Court for the Northern District of Ohio (Eastern Division), which denied to Wong Doo, a Chinese alien, a writ of habeas corpus and remanded him to the custody of the immigration authorities for deportation to China. It has an extended history.

Wong Doo, the petitioner, landed at San Francisco on January 25, 1915. He was then about 15 years of age and gained admission upon the claim that he was the minor son of a Chinese merchant, Wong Sun, alleged to be then lawfully domiciled in the United States. In April 1915, in company with his father, Wong Sun, and his brother, Wong Fee, he moved to Cleveland, Ohio. There, on August 3,

94285—24

1915, the immigration officers found him, his father, brother, and one Chan Yim, living at a Chinese laundry, took them into custody and examined them. A number of the neighbors and customers of the laundry were also examined. From these statements it appeared that although the petitioner, Wong Doo, had for a time been attending a public school, his father and brother had been employed as laborers in the laundry. Other investigations were made and the information submitted to the Department of Labor, which issued a warrant of arrest for each of the four aliens, Wong Doo, Wong Fee, Wong Sun, and Chan Yim, in which each was charged with having been found in the United States in violation of the Chinese Exclusion Laws and the rules of the Secretary of Labor made in pursuance thereof, in that they had gained admission fraudulently.

Thereupon began the chain of litigation which has brought this case here. It consists of two deportation proceedings before the immigration officers and three habeas corpus proceedings in the District Court; and the principal question presented is whether the doctrine of *res adjudicata* applies to a judgment denying or dismissing a writ of habeas corpus, so that in the instant case the judgment rendered in the second habeas corpus proceeding precluded a consideration upon the third writ of those matters adjudicated in the second. For convenience we shall refer to these as the First and Second Deportation Proceedings and the First, Second, and Third Habeas Corpus Proceedings.

FIRST DEPORTATION PROCEEDING

On August 3, 1915, the petitioner and his associates were taken into custody and examined by the immigration officers under authority which they claimed to have by virtue of Section 21 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898. A formal warrant of arrest was issued and served August 9. On August 10, 1915, a hearing was begun at which the aliens were represented by counsel. At their request the hearing was successively continued to August 23, to August 27, to January 15, 1916, and finally to January 17, 1916. Full opportunity was given to their counsel to examine the preliminary statements made by the aliens and other witnesses and to present any evidence in their behalf which might be pertinent. The record of this hearing, which was introduced in evidence in the Third Habeas Corpus Proceeding, has been filed with the Clerk of this Court in the form in which it was offered as an exhibit before the District Court. It comprises what has been designated by the Clerk as the "Second Section," the pages of which are numbered in red pencil from 1 to 81.

On April 5, 1916, the Secretary of Labor issued his warrant of deportation. Thereupon the petitioner presented a petition to the District Court for the Northern District of Ohio for a writ of habeas corpus, which inaugurated the

FIRST HABEAS CORPUS PROCEEDING

The record of this proceeding is not before the Court. It appears, however, from the opinions of the District Court (*Wong Sun* v. *Fluckey*, 283 Fed.

989) and of the Circuit Court of Appeals (*Wong Sun* v. *United States*, 293 Fed. 273, Transcript of Record, page 20), filed in the instant case, that in this first proceeding it was urged on behalf of the aliens that the Secretary of Labor had no jurisdiction to arrest, hear, or deport Chinese aliens for violation of the Chinese Exclusion Acts. Those Acts provided for a judicial hearing before a justice, judge, or commissioner of any United States court, while that afforded by the Immigration Act of 1907 was an administrative hearing before the immigration officers. It was contended that when a Chinese alien was charged with a violation of the Exclusion Acts he was entitled to the judicial hearing provided by those Acts. This was sustained in *United States* v. *Woo Jan*, 245 U. S. 552 (January 28, 1918), and in accord with that decision the petitioner was discharged from custody on March 28, 1918. (See also *Ex parte Woo Shing*, 226 Fed. 141; *United States* v. *Woo Jan*, 250 Fed. 595; and *Woo Shing* v. *Fluckey*, 250 Fed. 598.)

SECOND DEPORTATION PROCEEDINGS

Meanwhile the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874 (effective May 1, 1917), had been enacted, and on March 27, 1918, new warrants for the arrest of the petitioner and his associate were issued by the Secretary of Labor under authority of Section 19 of that Act. These warrants charged (R. 8):

> That he has been found within the United States in violation of rule 9, Chinese rules,

> and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes.

They were taken into custody on April 2, 1918, and on April 16 a hearing was begun at which the petitioner was again represented by counsel. At the outset the immigration inspector notified the aliens that the testimony and exhibits taken in the First Deportation Proceeding would be introduced in evidence, and a copy of them furnished to counsel. Counsel for the aliens requested a continuance which was granted, and a final hearing was held on September 17, 1918. The record of this hearing has also been filed with the Clerk of this Court and has been designated as "Section 1," comprising that portion which is numbered in blue pencil.

At this hearing counsel for the aliens demanded that the inspector produce for cross-examination the witnesses whose statements had been introduced in the First Deportation Proceeding. The inspector stated that all but one or two were residents of Cleveland whose presence could be readily obtained if the aliens were willing to pay the witness fees; that he disliked to summon them from their work without paying them; and that the Department had no funds for such purpose; but that he would issue subpoenas if the aliens would pay the fees. Counsel for the aliens declined. The inspector then offered to go with the aliens to the respective homes or places of

employment of the several witnesses, and to take their testimony upon cross-examination so that the payment of witness fees would be unnecessary. Counsel for the aliens refused to do this, and those witnesses were not cross-examined. The inspector also offered to arrange for the cross-examination of the one or two witnesses who resided outside of Cleveland, and to give the aliens an opportunity to verify the results of investigations made by immigration officers in California. These offers were also declined. (See Record on file with the Clerk, First Section, page 10.) The hearing was concluded and on June 15, 1920, the Secretary of Labor issued a warrant for deportation. (R. 9.)

SECOND HABEAS CORPUS PROCEEDING

On June 29, 1920, the petitioner sought a writ of habeas corpus from Judge Westenhaver, of the District Court for the Northern District of Ohio, upon two grounds: (1) That as he had entered the United States before May 1, 1917, he was entitled to the judicial hearing provided by the Chinese Exclusion Acts, and could not be arrested, heard, or deported by the immigration officers under Section 19 of the Immigration Act of 1917; and (2) That the hearing accorded him by the immigration officers "was manifestly unfair and not impartial to this petitioner, but, on the contrary, was examined on several occasions by said J. Arthur Fluckey and his assistants, without the privilege of counsel, and found by said Fluckey to be unlawfully in the United States, solely from the testimony of witnesses, cross-examination

of whom was not had by your petitioner's counsel." (See *Wong Sun* v. *Fluckey*, 283 Fed. 989,990, and Transcript of Record p. 21, note 1.) The return (1) denied the petitioner's right to a judicial hearing and (2) denied generally and specially all allegations of unfairness. (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 990, and Transcript of Record, page 21, note 2.)

At the hearing upon this petition and return on November 3, 1920, the departmental record upon which the order of deportation was based was not offered in evidence (R. 12, 13) nor was any proof offered to sustain the charge that the hearing had been unfair (R. 22). There is no doubt that counsel then relied most strongly upon the jurisdictional question raised, and there being no evidence upon the question of alleged unfairness the court did not seriously consider it.

On December 14, 1920, the District Court denied the writ, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. After the appeal was argued, but before it was disposed of, this Court delivered its opinion in *Ng. Fung Ho* v. *White*, 259 U. S. 276 (May 29, 1922), in which it held that the Immigration Act of 1917, unlike the prior act of 1907, did give the Secretary of Labor authority to arrest, hear, and deport Chinese aliens who were thereafter found to be in the United States in violation of the Exclusion Acts. The Circuit Court of Appeals then affirmed the decree of the District Court in an opinion delivered June 28, 1922, which is reported under the name of *Woo Shing* v.

United States, 282 Fed. 498. The mandate was filed on August 3, 1922 (R. 11) and thereupon the petitioner instituted this, which is the

THIRD HABEAS CORPUS PROCEEDING

The petition filed August 8, 1922, averred that the First Deportation Proceeding was unfair (and, we assume, wanting in due process), that there was no competent evidence to sustain an order of deportation, and that the petitioner was legally entitled to remain in the United States (R. 2, 3). It made no reference whatever to the Second Deportation Proceeding nor to the Second Habeas Corpus Proceeding. The return recited briefly the facts concerning the prior proceedings and averred that the hearings had in all respects been fair, just, and regular, and that the immigration officers had in no wise exceeded or abused their discretion (R. 5–7). Shortly afterward an amended return was filed which denied the allegations of unfairness with more precision, and set out in greater detail the facts of the Second Habeas Corpus Proceeding, showing that all of the present issues had then been raised and that the judgment in that case precluded the present inquiry upon the doctrine of *res adjudicata* (R. 10–11). The petitioner filed a reply in which he insisted that *res adjudicata* did not apply because (1) the present issues had not heretofore been considered or decided and (2) the doctrine of *res adjudicata* does not apply to a judgment denying or discharging a writ of habeas corpus. (R. 12).

The record in the Second Habeas Corpus Proceeding was attached to the amended return as "Exhibit C" (R. 11) and at the hearing the petitioner offered in evidence the departmental records of the First and Second Deportation Proceedings. (See Stipulation, R. 17.)

On October 6, 1922, the District Court denied the writ and remanded the petitioner to the custody of the immigration officers (R. 14; *Wong Sun* v. *Fluckey*, 283 Fed. 989). Upon appeal to the Circuit Court of Appeals that court on November 12, 1923, affirmed the decree of the District Court (R. 20; *Wong Sun* v. *United States*, 293 Fed. 273).

The questions now presented to the Court are:

1. Does the doctrine of *res adjudicata* apply to a judgment denying a writ of habeas corpus?

2. If it does not, then was the petitioner entitled to be discharged upon the record before the District Court?

ARGUMENT

I

Res adjudicata applies to a judgment denying or dismissing a writ of habeas corpus

The petitioner's first objection to applying the doctrine of *res adjudicata* is that the question whether he had been deprived of due process of law was not considered or decided by the court in the former proceeding. It is clear, however, from the opinions of the District Court (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 990), and of the Circuit Court of Appeals (R.

20, 21, notes 1 and 2), that this issue was clearly and distinctly raised by the pleadings in the former case, and upon well settled authority the former judgment is a final and conclusive adjudication not only of the matters emphasized by counsel in argument and discussed in the opinion of the court, but also of all matters which might have been so considered and decided. (*Black on Judgments*, 2d. Ed., Vol. 2, § 613; *New Orleans* v. *Citizens Bank*, 167 U. S. 371, 398; *So. Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48.) Accordingly the petitioner can hope to prevail here only upon the broad ground that the doctrine of *res adjudicata* does not apply to a judgment denying or dismissing a writ of habeas corpus.

We recognize that this was indeed the rule at common law in the case of one held on a criminal charge, and an unsuccessful petitioner for the writ might apply in turn to every available court or judge in the realm. But in this, as in the case of many other rules of the common law so jealous of the liberty of the subject, the reasons upon which it was founded belong to an age that is past and have since ceased to exist. They were two: (1) At common law the facts stated in the return to the writ were taken as true, and the hearing was summary and without opportunity to frame and try issues of fact; and (2) No right of review by writ of error or appeal existed. The right to successive writs was a sort of imperfect substitute for that of review in an appellate tribunal. However, the statutes and the practice in the Federal courts now provide that the

return may be traversed, the court may hear and determine issues of fact, and its judgment may be reviewed upon writ of error or appeal. And with the complete disappearance of the reasons, this rule of the common law, which stood as a striking exception to the otherwise universal application of the doctrine of *res adjudicata*, was abrogated. *Cessante ratione legis cessat et ipsa lex.* No statute setting aside the rule was necessary; those which removed the reasons for the rule were sufficient. (*State ex rel. Durner* v. *Huegin*, 110 Wis. 189, 226.)

Moreover, it is doubtful whether the rule at any time was applicable to a proceeding of this character. The primary issue involved is that of the petitioner's status. It is analogous to that of a proceeding to determine the right of custody of an infant or the sanity of an insane person, to which the doctrine of *res adjudicata* is uniformly held to apply. (*Wong Sun* v. *Fluckey*, 283 Fed. 989, 994–995.)

While the question has not heretofore been considered or decided by this court, the able discussion and review of the cases made by Judge Westenhaver of the District Court (283 Fed. 989) and by Judge Knappen of the Circuit Court of Appeals (R. 20) render any further discussion of it in this brief an unwarranted trespass upon the time and attention of this Court. We confidently rest upon the reasoning of those opinions, and in the language of Judge Westenhaver we submit that—

> In view of the protracted efforts of the United States immigration authorities to ex-

clude this petitioner from the United States, and his hitherto successful efforts in opposition, these propositions are somewhat startling and should not be sustained unless such is clearly the law (283 Fed. at p. 992).

* * * * *

Aside from the change of law resulting from the granting of a right of review, the reasons for the common law rule permitting repeated applications in habeas corpus cases have so far failed or have so little pertinency in the present situation that it would be little short of absurd to apply that rule and permit the petitioner to vex other judges of this district, or other districts and Circuit Courts of Appeal of this circuit or other circuits, with new applications to retry what has or may be determined by this court and reviewed by the Circuit Court of Appeals. (Id. p. 994.)

II

The petitioner was not entitled to be discharged

If the District Court had considered the petition upon its merits, its decision would not have been different. The petitioner was not entitled to be discharged. While the averments of the petition and the assignment of errors do not set forth clearly the legal grounds upon which counsel believe the petitioner should be discharged, we understand the contention to be that the hearing by the immigration officers in the Second Deportation Proceeding was such that by the order of deportation based thereon he will be deprived of his liberty without due process of law. The specific objections are that there were

introduced in evidence at that hearing (1) statements made by the petitioner and his associates before they were formally arrested and without their being first advised of their right to have counsel, (2) statements made by witnesses who were not produced by the immigration inspector for cross-examination by the petitioner, and (3) certain letters and papers taken from the clothing and effects of the petitioner's associates at the time of their arrest.

As to the statements made by the petitioner prior to his arrest, the recent decision of this Court in *Bilokumsky* v. *Tod*, 263 U. S. 149, 155–156, is conclusive. They were freely made by the alien and might properly be considered as evidence upon the hearing.

It is true that there were introduced in evidence statements made by others who were not cross-examined by the petitioner. But, as we pointed out in the opening statement, the inspector offered to go with counsel for the alien to the several homes or places of business of these witnesses and to incorporate in the record their cross-examination. Counsel declined the offer, choosing to stand upon the highly technical ground that it was the inspector's duty to bring the witnesses to the place of hearing. Under these circumstances cross-examination of these witnesses was not denied but waived. (See report of proceedings on file with the Clerk, Section 1, pages 4 and 11 numbered in blue pencil.)

As to the documents introduced. Conceding *arguendo* that they were obtained by an unlawful search

and seizure and that the rule of *Boyd* v. *United States*, 116 U. S. 616, is applicable to a proceeding of this character, still it will be found from an examination of the record on file with the Clerk that these documents were not found among the effects of the petitioner, but of his father Wong Sun. They would not, therefore, be inadmissible against him. (*Wilson* v. *United States*, 221 U. S. 361; *Dreier* v. *United States*, 221 U. S. 394; *Haywood* v. *United States*, 268 Fed. 795.) If they were excluded, however, there would still remain sufficient evidence in the record to support the order of deportation and to show that there was no such hasty, arbitrary, or unfair action or abuse of discretion by the immigration officers and the Secretary of Labor as would amount to depriving the alien of due process of law. (See *United States ex rel. Tisi* v. *Tod*, No. 132, Oct. Term, 1923, decided Feb. 18, 1924, and cases there cited.)

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

APRIL, 1924.

○

WONG DOO *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 736. Argued April 10, 1924.—Decided May 26, 1924.

1. The strict doctrine of *res judicata* does not apply to *habeas corpus*. *Salinger* v. *Loisel*, *ante*, 224. P. 241.
2. But the court, in its sound discretion, may dismiss a petition for *habeas corpus* because of a prior refusal, when the ground for the second application was set up, with another, in the first, and when the evidence to support it then was withheld without excuse for use on a second attempt if the first failed. *Id.*
3. Where unreasonable delays have been caused by resort to *habeas corpus* proceedings, the mandate of this Court will issue forthwith. *Id.*

293 Fed. 273, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a decision dismissing a petition for *habeas corpus*.

Mr. William J. Dawley and *Mr. Jackson H. Ralston*, with whom *Mr. George W. Hott* was on the briefs, for petitioner.

Mr. George Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a second petition for a writ of *habeas corpus* by a Chinese in custody under an order of deportation issued under § 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874.

In the first petition the validity of the order was assailed on two grounds: one that the Secretary of Labor

issued it without lawful jurisdiction, and the other that the administrative hearing on which it rested was not adequate or fair but essentially arbitrary. The return, besides answering the first ground, denied there was in fact any basis for the second. At the hearing in the District Court on these issues the petitioner offered no proof in support of the second ground. The court ruled that the first was not good in law, remanded the petitioner and dismissed his petition. He appealed to the Circuit Court of Appeals, and it affirmed the decision.

Later the second petition was presented to the same District Court. In it the petitioner relied entirely on the second ground set forth before. There was some elaboration in stating it, but no enlargement of the substance. The petitioner sought to distinguish the two petitions by alleging in the second that the earlier one was "based solely" on the jurisdictional objection; but that allegation was not true. The return in the second case fully denied the charge that the administrative hearing was inadequate, unfair and arbitrary; set up the prior petition and the proceedings thereon, and prayed a dismissal of the second petition.

After a hearing, the District Court ruled that the doctrine of *res judicata* applied; held the decision in the first case was conclusive in the second; remanded the petitioner, and dismissed the petition. 283 Fed. 989. On an appeal to the Circuit Court of Appeals that decision was affirmed. 293 Fed. 273.

In *Salinger* v. *Loisel*, just decided, *ante*, 224, we held that in the federal courts the doctrine of *res judicata* does not apply to a refusal to discharge a prisoner on *habeas corpus;* but that in those courts, where the prisoner presents a second petition, the weight to be given to the prior refusal is to be determined according to a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the subject.

It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of *res judicata*. But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.

We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner has been unreasonable; so the mandate from this Court will issue forthwith.

Judgment affirmed.

2080°—24——16